AUG 11 1950
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1950

No. 245

THE TODD COMPANY, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

JUSTIN J. DOYLE, Esq.,
CHARLES S. WILCOX, Esq.,
Counsel for Petitioner

EDWARD R. MACOMBER, Esq.,
of Counsel

Daily Record Company
Rochester, New York

INDEX

Subject Index

	Page
Petition for Writ of Certiorari	1
Concise Statement of the Matter Involved	1
Statement Disclosing Basis of Jurisdiction	3
The Questions Presented	4
Reasons Relied Upon for the Allowance of the Writ	5
Brief in Support of Petition for Writ of Certiorari	7
Opinion Below	7
Jurisdiction	7
Statement of the Case	7
Specification of Errors	8
Summary of the Argument—	
Point I	9
Point II	12
Conclusion	17

Table of Authorities Cited

Cases

A. F. of L. v. *N. L. R. B.*, 308 U. S. 401, 411	12
Continental Oil Co. v. *N. L. R. B.* (C. C. A. 10), 113 F. (2d) 473, 484	13
Falk Corp., N. L. R. B. v., 308 U. S. 453, 459	12
Forsyth v. *Hammond*, 166 U. S. 506, 513	4
Franks Bros. Co. v. *N. L. R. B.*, 321 U. S. 702, 703	13
Gay v. *Ruff*, 292 U. S. 25, 30	4
Hamilton Brown Shoe Co. v. *N. L. R. B.* (C. C. A. 8), 104 F. (2d) 49	15
Hammond, Forsyth v., 166 U. S. 506, 513	4
Highland Shoe Inc., N. L. R. B. v. (C. C. A. 1), 119 F. (2d) 218, 219	13
N. L. R. B., A. F. of L. v., 308 U. S. 401, 411	12
N. L. R. B., Continental Oil Co. v. (C. C. A. 10), 113 F. (2d) 473, 484	13

Page

N. L. R. B. v. *Falk Corp.*, 308 U. S. 453, 459 12
N. L. R. B., Franks Bros. Inc. v., 321 U. S. 702, 703 13
N. L. R. B., Hamilton Brown Shoe Co. v. (C. C. A. 8), 104 F. (2d) 49 15
N. L. R. B., Highland Shoe Inc. v. (C. C. A. 1), 119 F. (2d) 218, 219 13
N. L. R. B. v. *National Licorice Co.* (C. C. A. 2), 104 F. (2d) 655, *mod.* 309 U. S. 359 15
N. L. R. B., Oughton v. (C. C. A. 3), 118 F. (2d) 486, 488 13
N. L. R. B., Times-Mirror Corp. v., 331 U. S. 789 ..... 4, 10
N. L. R. B. v. *Weirton Steel Co.* (C. C. A. 3), 146 F. (2d) 144, 145 10
N. L. R. B. v. *Whittier Mills Co.* (C. C. A. 5), 123 F. (2d) 725, 727 10

Oughton v. *N. L. R. B.* (C. C. A. 3), 118 F. (2d) 486, 488 13

Ruff, Gay v., 292 U. S. 25, 30 4

Times-Mirror Corp. v. *N. L. R. B.*, 331 U. S. 789 ..... 4, 10

United States, Virginia Railway Co. v., 272 U. S. 658 10

Virginia Railway Co. v. *United States*, 272 U. S. 658 10

Weirton Steel Co., N. L. R. B. v. (C. C. A. 3), 146 F. (2d) 144, 145 10
Whittier Mills Co., N. L. R. B. v. (C. C. A. 5), 123 F. (2d) 725, 727 10

STATUTES

62 STAT. 928 (1948) U. S. Code Title 28, Sec. 1254 3

Supreme Court of the United States

OCTOBER TERM 1950

No.

THE TODD COMPANY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Todd Company, Inc., (hereinafter sometimes referred to as the Petitioner) respectfully petitions for a Writ of Certiorari to review an Order of the United States Court of Appeals for the Second Circuit, dated June 27, 1950, adjudging the Petitioner in contempt for having failed to comply with, disobeyed and violated a Decree of said Court of Appeals entered in the records of said Court April 19, 1949.

Concise Statement of the Matter Involved

The Petitioner herein is a corporation organized under the Laws of the State of New York, and is engaged in the business

of manufacturing machines for writing checks, bank checks printed on safety paper, and other related items. Early in February, 1944, Local No. 38 of the International Printing Pressmen and Assistants Union of North America was certified by the National Labor Relations Board (hereinafter sometimes referred to as the Respondent or the Board) as the sole collective bargaining agent for the mechanical employees of the Letterpress Department of the Printing Division of the Petitioner's plant as the result of a very close vote in an election held by Respondent (R. 27).

The collective bargaining negotiations which ensued and the various proceedings instituted by the National Labor Relations Board between February, 1944, and March, 1949, are set forth in detail in the affidavit filed by Petitioner in support of its Answer to the Petition for an Order Adjudging the Petitioner in civil and criminal contempt in the Court below (R. 27). It should be noted (and the fact is not disputed by the Respondent) that the employees in the unit on three occasions petitioned the Respondent for a decertification election, stating they no longer wished to be represented by the Printing Pressmen's Union. These Petitions were as follows:

(a) January 7, 1947—signed by 31 employees out of a total of 41 in the bargaining unit. Petition denied by Respondent without a hearing. (R. 32)

(b) August 30, 1949—signed by every employee in the unit. Withdrawn by the employees who petitioned, as the result of a statement by a representative of the Respondent that it could not be granted at that time, but should be filed later. (R. 33)

(c) January 4, 1950—signed by all employees in the unit. Denied without a hearing. (R. 35)

On April 19, 1949, on petition by the Respondent, the Court of Appeals for the Second Circuit duly entered its Decree enforcing the Order of the Board against the Petitioner herein. On June 8, 1950, the Board served on the Petitioner an Order to Show Cause, Petition to Adjudge in Civil Contempt and to Adjudge and Punish in Criminal Contempt, with supporting affidavits and exhibits, (R. 1), on the ground that Petitioner had not complied with said Decree of April 19, 1949. Petitioner herein duly filed and served its Answer with supporting affidavits (R. 25) and the matter was heard before the Court of Appeals for the Second Circuit on June 19, 1950. On June 27, 1950, the Court handed down its decision, which we quote in full:

> "Motion to adjudge in civil contempt granted with penalty of $1,000 with leave to move to impose an additional penalty per day in the event that our enforcement order is not complied with within ten days after June 27, 19[illegible] the date of this order. Motion to adjudge in criminal contempt denied." A.N.H. J.N.F., U.S.C.J.J. H[illegible]. U.S.D.J.

Statement with Respect to Jurisdiction

(1) Jurisdiction is invoked under the provisions of Section 1254 of Title 28 of the United States Code, (62 STAT. 928, 1948).

(2) The Order of the Court of Appeals for the Second Circuit was entered June 27, 1950. Petition to said Court for a stay of enforcement of the Order was duly made, and a stay granted on July 5 ,1950. until the Petitioner herein should apply to the Supreme Court for a stay, providing that application be made on or before July 25, 1950 (R. 42). On July 6, 1950, Petitioner applied to Mr. Justice Jackson, of the United States Supreme Court, for a stay, which stay was duly granted on the 10th day of July, 1950, providing a Petition

for Writ of Certiorari be filed on or before August 15, 1950. Petitioner herein has not complied with said Order of the Court of Appeals, Second Circuit, of June 27, 1950, nor with any part thereof.

(3) The Order of June 27, 1950, entered upon the Board's motion to adjudge Petitioner herein in civil contempt and to adjudge and punish in criminal contempt, without any findings or opinion in support of said Order, is in conflict with decisions of other Courts of Appeals; decides, without taking evidence or making findings, controverted material issues; decides important question of Federal Law in summary proceedings in a way probably in conflict with the applicable decisions of this Court and of other Courts of Appeals; and has so far departed from the accepted and usual course of judicial proceedings in such matters as to call for the exercise of the power of supervision of this Court.

(4) The following cases establish jurisdiction:

Times-Mirror Corp. v. *N. L. R. B.*, 331 U. S. 789,

Gay v. *Ruff*, 292 U. S. 25, 30,

Forsyth v. *Hammond*, 166 U. S. 506, 513.

The Questions Presented

The questions presented on this application are as follows:

(1) Where the Board's Petition and Affidavits disclose that collective bargaining negotiations have been carried on over a period of six to eight months, but allege that nevertheless the Todd Company had refused to bargain in good faith, and where the Answer and Answering Affidavits deny and controvert in several respects the material allegations of the Petition of the Board, may the Court summarily adjudge Petitioner in contempt for having negotiated in bad faith, and im-

pose a penalty without making findings, or filing an opinion identifying the acts or omissions which the Court adjudged constitute bad faith, or without referring the matter to a Master?

(2) Having issued a Decree requiring Petitioner, among other things, to recognize the rights of its employees guaranteed in Section 7 of the National Labor Relations Act to bargain collectively through representatives of their own choosing, may the Court summarily adjudge Petitioner in contempt for taking the position in collective bargaining negotiations that the contract offered by Petitioner should not include recognition of a Union by which the employees had stated they no longer desired to be represented, at least until they were allowed to express their choice in a formal election, and that the employees should not be coerced into representation they did not desire by any act of the Petitioner in contractually committing them to such representation against their express wishes?

Reasons Relied Upon for the Allowance of the Writ

The Order of the Court of Appeals dated June 27, 1950, summarily adjudging Petitioner herein in contempt without findings or opinion, and without reference of the disputed issues to a Master, leads to the inevitable conclusion that the Court has accepted as true certain material allegations of the Board's Petition which were controverted by the Answer of the Petitioner herein, and has effectually denied to Petitioner the right to present witnesses and their testimony, and to cross-examine the witnesses presented by the Board. The decision has further left unanswered, by reason of the lack of findings or opinion, the question of whether the Board's arbitrary refusals, made without a hearing, on three separate occasions, to entertain a Petition by the employees in the unit involved for a change of representation, were proper, and further whether

the Petitioner herein was justified, under the peculiar facts of this case, in refusing unconditional recognition of a Union certified six years previously, but rejected by the employees three times within a period of three years preceding the refusal. These issues the Petitioner, at its peril, must determine without benefit of findings or opinion of the Court.

WHEREFORE, your Petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Second Circuit, to the end that the Order of June 27, 1950, may be reveiwed and determined by this Court, as provided by the statutes of the United States; and that said Order of said Court of Appeals be reversed by this Court; and for such other and further relief as to this Court may seem just and proper.

Dated: July 31st, 1950.

THE TODD COMPANY, INC., *Petitioner*,

By, ...

JUSTIN J. DOYLE, Esq.,

By, ...

CHARLES S. WILCOX, Esq.,
Counsel for Petitioner

EDWARD R. MACOMBER, Esq.,
of Counsel

Supreme Court of the United States

OCTOBER TERM 1950

No.

THE TODD COMPANY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion Below

No opinion or findings were filed by the United States Court of Appeals for the Second Circuit. The Order adjudging Petitioner in contempt, which Petitioner herein seeks to have reviewed, dated June 27, 1950, appears in the Record at page 24 and is quoted in the Petition at page 3.

Jurisdiction

The basis of jurisdiction is set forth at page 3 of the Petition for the Writ, and in the interest of brevity is incorporated here by reference.

Statement of the Case

A concise statement of the case appears at page 1 of the Petition for the Writ, and in the interest of brevity is incorporated herein by reference.

Specification of Errors

The United States Court of Appeals for the Second Circuit erred:

(1) In adjudging Petitioner herein guilty of civil contempt in a summary proceeding, without findings or opinion, or reference to a Master, upon conflicting, verified allegations of material facts essential to the support of the contempt order.

(2) In failing to accept as true the material allegations of Petitioner's Answer and Affidavits attached thereto.

(3) In accepting as true the material allegations of the Board's Petition, although denied and not admitted in several respects in Petitioner's Answer.

(4) In failing to require the Board to prove by competent and material evidence the material allegations of its Petition which were denied, or which were not admitted in the Answer.

(5) In denying Petitioner herein the privilege of confronting the Board's witnesses, cross-examining them, and adducing evidence to disprove the material allegations of the Petition which were denied or not admitted in the Answer.

(6) In deciding the issues of fact joined in the pleadings material to the charge of contempt, upon such pleadings and the supporting affidavits.

(7) In deciding, upon conflicting allegations of the pleadings and contradictory statements of the supporting affidavits, that Petitioner herein had committed contempt of a Decree of the Court.

(8) In failing to resolve all reasonable issues and inferences from the pleadings in favor of Petitioner herein.

(9) In refusing, without stating any reason therefor in any opinion or finding, to pass upon Petitioner's contention

that the Board's several refusals to grant the Petitions of Petitioner's employees for an opportunity to express their preference with respect to collective bargaining representation, was a denial of the rights guaranteed to Petitioner's employees under Section 7 of the National Labor Relations Act, and was arbitrary and capricious.

POINT I

The Court erred in finding Petitioner guilty of contempt in a summary proceeding without reference, without findings, and without opinion, where the pleadings upon which the contempt order is based, by appropriate denials under oath in the Petitioner's return, put in issue some of the material allegations of fact necessary to support the order of contempt.

Where the pleadings join issue upon allegations of material facts necessary to sustain a contempt order, the Court may not in summary proceedings resolve the issues against the party respondent. In such instance the movant is required to prove its charges by competent and material evidence. In such case all reasonable intendments and inferences from the pleadings as a matter of law must be taken against the movant and in favor of the opponent. The Board should have been required to prove any facts material to the finding of contempt which were denied or which stood unadmitted in the Answer. Respecting charges in the Board's Petition necessary to sustain the Order of Contempt, and which are denied in the Answer, Petitioner should have been accorded the privilege of confronting the Board's witnesses, cross-examining them, and offering evidence to disprove such charges. The conflicting allegations created an issue on material facts necessary to sustain the Order and such issue should not have been decided upon the pleadings or

the Affidavits. The Order finding Petitioner herein guilty of contempt may not be determined in a summary proceeding without opinion or findings from conflicting allegations of the pleadings and contradictory statements of the Affidavits.

Times-Mirror Corp. et al., v. *N. L. R. B.*, 331 U. S. 789;

Virginia Railway Company v. *United States*, 272 U. S. 658, 675;

N. L. R. B. v. *Whittier Mills Co.* (C. C. A. 5), 123 F. (2d) 725, 727;

N. L. R. B. v. *Weirton Steel Co.* (C. C. A. 3), 146 F. (2d) 144, 145.

The following allegations of the Board's Petition were denied in whole or in part:

Paragraph III (R. 2)—alleged the decision upon which the Decree of the Court of Appeals was issued expressly rejected Petitioner's contention that it was not obligated to bargain with the Union because a majority of the employees had requested decertification. This was denied. (R. 25).

Paragraph IV (R. 3)—alleged that your Petitioner herein had refused and failed to bargain collectively in good faith. This was denied. (R. 25).

Paragraph V (R. 3)—Your Petitioner denies that during the negotiations with the Union it asserted that it would not consummate any agreement with the Union unless the Union first established its majority at an election. The Answer and supporting Affidavits clearly show that Petitioner offered a contract to the Union, restricted only as to recognition. (R. 25).

Paragraph VI (R. 3)—alleges that the Union and Petitioner reached an agreement on all disputed provisions, but

Petitioner refused to execute the agreement without an election. This Petitioner denied in its Answer. (R. 25).

Paragraph VII (R. 3)—Petitioner denied the allegation in this paragraph to the effect that it would not enter into a contract for a limited period unless an election was held. Petitioner in its Answer alleged under oath that with respect to this specification it merely took the position that the employees should not be contractually bound to representation they did not desire for a period longer than was necessary to enable them to have the issues determined by an election. (R. 25).

It can be easily discovered by an examination of the Petition and the matters placed in issue by the Answer, that in at least two material respects there were sharp issues of fact presented by the pleadings:

(1) Did the Petitioner refuse to sign a contract without a previous election, as alleged by the Board, or did it state that it was willing to sign a contract, but took the position that the recognition clause in said contract should become effective only after the wishes of the employees with respect to bargaining representation had been determined, as guaranteed them under the Act?

(2) Did the Petitioner refuse to sign a contract for a limited period unless and until an election was held, as contended by the Board, or did Petitioner take the position (as it contends) that the period of the contract should be no longer than the period necessary to enable the employees to have their wishes determined by an election as provided by the Act?

POINT II

The Court erred in refusing to review the arbitrary and capricious denials by the Board of the employees' petitions for decertification elections, or in the alternative, to pass upon Petitioner's contention that since the rights guaranteed to the employees under the act had been improperly denied them, Petitioner was under no obligation to take affirmative action which would deny to its employees the right guaranteed them under the act to be represented in collective bargaining by representatives of their own choosing.

We are well aware of the rule heretofore established by decisions of this Court, that representation certifications of the Board are, as a general rule, excluded from the review by Federal Appellate Courts authorized by the National Labor Relations Act, with respect to unfair labor practice charges, except in the circumstances specified in the Act.

A. F. of L. v. *N. L. R. B.*, 308 U. S. 401, 411;

N. L. R. B. v. *Falk Corp.*, 308 U. S. 453, 459.

Both cases, however, intimate that review may be had in instances where the Board has ordered the employer to do something predicated upon the results of an election, and *A. F. of L.* v. *N. L. R. B.*, *supra*, at page 459 quotes from the discussion of the National Labor Relations Act on the Senate floor as follows: "It provides for review in the Courts only after the election has been held and the Board has ordered the employer to do something predicated upon the result of an election. 79 Cong. Rec. 7658."

That is precisely the case here, for the Court of Appeals has ordered the Petitioner to do something on penalty of continuing fines.

We are likewise familiar with the line of decisions in the Courts of Appeal for several of the Circuits, that an employer may not refuse to bargain with an organization which has been duly certified, and then avail himself of the bargaining agency's loss of majority support which was presumably brought about by his own conduct. The rule, when based on a presumption reasonably inferred from the facts, is a just one, but the facts of the case at bar do not support such a presumption here. This rule has arisen in cases where the presumption was clearly justified—where the unfair labor practices found to exist were of a drastic and overt nature, such as:

(a) Supervisors in the plant discouraging employees from joining the Union, *Oughton* v. *N. L. R. B.*, (C. C. A. 3), 118 F. (2d) 486, 488,

(b) Employer threatening to close down the plant if the employees joined the Union, *Franks Bros. Co.* v. *N. L. R. B.*, 321 U. S. 702,

(c) Employer calling a meeting of employees without notifying the Union representative, and stating that unless a wage cut were accepted by the employees the plant would close down, *N. L. R. B.* v. *Highland Shoe Inc.*, (C. C. A. 1), 119 F. (2d) 218, 219,

(d) Transferring employees from permanent to temporary status and discharging employees because of labor union activities, *Continental Oil Co.* v. *N. L. R. B.*, (C. C. A. 10), 113 F. (2d) 473, 484.

In this case there were no overt acts of intimidation or coercion so frequently referred to in the cases cited in support of the rule, but on the contrary:

(a) There was no refusal to bargain. There were numerous conferences, both before unfair labor charges

were filed in 1944, and following the Decree of the Court of Appeals in 1949 enforcing the Board's Order,

(b) The Union majority in 1944 was exceedingly small. The loss of it over a period of five years cannot be presumed to be the result of any conduct on the part of the Petitioner herein.

Clearly, the continued insistence of from three-fourths to a hundred per cent of the employees in the unit over a period of three years that they be allowed to have other representation, in the absence of a finding of coercive and intimidating conduct by the employer, shows that the Union had lost its support for reasons other than any act of Petitioner herein.

This is not merely a case where a Union or an employer seeks judicial review of an Order of the Board directing or refusing an election. The Petitioner here seeks a review of the decision that its conduct has been contemptuous in taking the position in negotiations with the Union that if a contract is to be signed, including exclusive recognition, recognition of the Union shall be conditioned upon the Union's demonstrating in a proper election that it is entitled to such recognition. It is one thing for the Court of Appeals to state that it will not review a decision of the Board refusing to grant a Petition for a decertification election signed by one hundred per cent (100%) of the employees involved, but it is quite another thing to hold the employer in contempt in his negotiations with the Union for refusing to ignore the expressed wish of one hundred per cent of his employees.

The situation presented by the facts of this case should be reviewed by this Court. It is not only important to employers of labor who may risk citations for alleged contemptuous conduct in attempting to protect what they believe to be the rights of their employees, guaranteed them by the Act, but it is like-

wise of great importance to employees subject to the National Labor Relations Act, since, if the Court of Appeals decision in this case is not reviewed, it results in the denial of rights given to the employees by Federal statute, by the process of compelling an employer, under penalty of contempt, to contractually recognize an organization they have expressly repudiated.

It is respectfully submitted that the admitted facts of this case clearly call for a study and limitation of the general rule based on the presumption heretofore referred to. Factual situations have required modification and limitation of the rule:

> *N. L. R. B.* v. *National Licorice Co.*, (C. C. A. 2) 104 F. (2d) 655; *mod.* 309 U. S. 359;
>
> *Hamilton Brown Shoe Co.* v. *N. L. R. B.*, (C. C. A. 8) 104 F. (2d) 49.

In the *Licorice Company* case the propriety of the Court's requiring a new election was apparently not raised by the Board before the Supreme Court.

The following facts, which we believe to be undisputed, take this case out of the general rule, and call for a ruling by this Court defining its limitations. These facts are:

(1) In February, 1944, (over six years prior to the bargaining negotiations undertaken by the Company) the complaining Union had been selected in preference to another Union by a very close majority. (R. 27.)

(2) The delay of five years which occurred between this election and the hearing of the Board's enforcement proceeding before the Court of Appeals has never been claimed to have been caused by the Petitioner, nor has the Petitioner been found guilty of any violation of the Act occurring after June, 1944.

(3) On January 7, 1947, almost three years after the Union had succeeded in obtaining certification by a bare majority, three-quarters of the employees in the unit evidenced their wish for other representation. (R. 32.)

(4) On August 30, 1949, the employees in the unit filed a Petition for a Decertification Election signed by 100% of them. (R. 33.)

(5) On January 4, 1950, the employees in the unit involved signed a Petition for Decertification signed by 100% of them. (R. 35.)

(6) In spite of repeated complaints from the men in the unit involved, through their representatives, that they no longer wished to be represented by the Uinon, and that they under no circumstances wished the Petitioner to sign a contract obliging them to be represented by this Union, the Petitioner for a period of seven months negotiated with the Union in an attempt to arrive at the terms of an agreement and an understanding as to how the question of recognition might be worked out. Negotiations were at no time broken off, and while the Union did not at any time agree to a Decertification Election, it at no time asserted that the Company was refusing to bargain during the period that the Petition of the employees for an election was being considered by the Regional Board and by the National Board.

(7) The Petitioner had never been adjudged guilty of the type of overt and intimidating unfair labor practices which had lead the Courts in other cases to say that such conduct might be construed to have caused a loss of Union majority.

Conclusion

WHEREFORE, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

JUSTIN J. DOYLE, Esq.,

CHARLES S. WILCOX, Esq.,
Counsel for Petitioner

EDWARD R. MACOMBER, Esq.,
of Counsel